**IN THE HIGH COURT OF HIMACHAL PRADESH**
**SHIMLA**

**FAO (Ord.) 135 of 2007.**

**Date of decision 17.7.2007.**

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**Ram Saroop** …**Appellant.**

**Versus**

**Trilok Singh and others** ..**Respondents.**

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*Coram*

**The Hon'ble Mr.Justice Dev Darshan Sud, J.**

*Whether approved for reporting?*[1]

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| **For the appellant** | **Mr. N.K.Thakur, Advocate.** |
| **For respondents 3 and 4** | **Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Janesh Gupta, Advocate.** |

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**Dev Darshan Sud, J. (Oral).**

**This is the defendant's appeal against the judgment and order of the learned District Judge whereby the entire case has been remanded for decision afresh by the learned trial Court.**

**The plaintiff preferred an appeal before the learned District Judge, Una against the judgment and decree of the learned Sub Judge Ist Class, Court No. 1, Una, dismissing their suit for declaration as prayed for.**

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[1] ***Whether reports of Local Papers may be allowed to see the judgment?***

**It was pleaded that the plaintiffs were the owners of the land as described in the suit. It was alleged that the appellant herein was threatening to dispossess the plaintiffs from the suit land and in the circumstances, a decree for declaration to the effect that the plaintiffs were the owners of 4/5$^{th}$ share of the suit land and a decree for injunction was prayed for.**

**During the pendency of the appeal, an application under Order 41 Rule 27 of the Code of Civil Procedure was moved by the plaintiffs for leading additional evidence, which was considered by the learned District Judge alongwith the appeal and the plaintiffs were granted permission to lead additional evidence. While disposing of the appeal, the learned appellate Court held that since the application was being allowed, no finding was being given on the merits of the appeal as urged by the parties. The appeal was allowed, the judgment and decree appealed against was set aside and the matter remanded to the learned trial Court for decision afresh in accordance with law. The appellant-defendant is aggrieved by the remand order.**

**I have heard the learned counsel for the parties and have gone through the record.**

**The learned District Judge was in error in remanding the suit. Order 41 Rules 28 and 29 of the Code of Civil Procedure prescribe the method for recording of additional evidence. The two rules provide:**

> **"28. Mode of taking additional evidence**
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> **Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence to direct the Court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.**
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> **29. Points to be defined and recorded**
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> **Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified".**

**The learned District Judge should have been alive to these two provisions giving him an option either to record the evidence himself or to direct the subordinate Court to take such evidence and to send it to the appellate Court. Rule 29 specifies that where additional evidence is directed, or allowed to be taken, the appellate Court is under a duty to specify the points**

**to which the evidence is to be confined and recorded on its proceedings. Admittedly, a wholesale remand is against the provisions of law.**

**The Hon'ble Supreme Court in Koyappathodi M. Ayisha Umma v. State of Kerala (AIR 1991 SC 2027) has held that remand for producing additional evidence is not warranted. In Uday Nath Nanda and others v. Bulei Guru and others (AIR 1970 Orissa 168), the High Court of Orissa has held:**

> **"Normally the additional evidence is possible to be received even in the appellate Court. Courts, however, have taken the view that it is open to the appellate Court to direct the original Court to take the evidence and other evidence in rebuttal. The lower appellate Court had, therefore, no business in this case to vacate the judgment of the trial Court and remit the entire case. That direction of the learned Additional Subordinate Judge must be vacated. The appeal must be maintained on his file and a chance would be given to the defendants to prove the Ekpadia as additional evidence and to the plaintiffs to lead evidence in rebuttal and the trial Court should be called upon to return the records with the additional evidence**

> **within a time to be fixed, where after the appeal must be disposed of taking into account the evidence already on record and the additional evidence now to be received." (Para 10 Page 170.).**

**To similar effect is the judgment of High Court of Patna in Kirti Bhushan Singh v. Dipti Bikash Bahaduri and others (AIR 1966 Patna 142), wherein it has been held:**

> **"1. The whole remand of the case to the trial Court for taking additional evidence and then dispose it of according to law is bad, being in contravention of the specific provisions of law, as provided in Rules 27 and 28 of Order 41 of the Code of Civil Procedure.**
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> **5. Mr. Lal Narayan Singh, appearing for one of the petitioners, has raised a point that, as provided in Rules 27 and 28 of Order 41 of the Code of Civil Procedure, the court of appeal below could have either taken the partnership agreement into evidence itself or directed the trial Court to take it into evidence and then send it to the court of appeal below, but it could not have remanded the whole case in the exercise of its inherent jurisdiction under S. 151 of the Code of Civil Procedure. The contention seems to be sound. The court cannot invoke its**

> **inherent jurisdiction against specific provisions of law. The order of remand of the whole case is bad and is, therefore, set aside. The learned court of appeal below will either take into evidence the partnership agreement itself or direct the trial Court to take it into evidence and then send it to it when the court of appeal below will decide all the questions arising in the appeals and dispose them of in accordance with law." (Paras 1 and 5, Pages 142 and 143).**

**In Hardev Mahato v. Pali Aziz (AIR 1965 Patna 132), the High Court has held that if the appellate Court thought it necessary that additional evidence could be required to be produced, then in that event, the procedure prescribed under Order 41 Rule 28 of the Code of Civil Procedure is to be followed. There is no jurisdiction vested in Court to set aside the judgment challenged in appeal and to remand the case on a wholesale remand. The decision of the Andhra Pradesh High Court in Vadla Veerabhadrappa v. Challa Venkatappa (AIR 1961 Andhra Pradesh 226) needs to be noticed. Setting aside a judgment of remand, the Court held:**

> **"9(5) If the appellate Court decides to receive additional evidence in**

> **appeal under O. 41 R. 27, CPC, it may itself record the additional evidence or direct the trial Court or any subordinate Court to record the same, and send up the evidence so recorded, to the appellate Court, which must then proceed to hear and dispose of the appeal in the light of the fresh evidence and evidence already on record in accordance with Rr.28 to 30 of O. 41, C.P.C. The appeal continues to remain on the file of the appellate Court till the additional evidence is received by it and the appeal heard and disposed of. There can be no question of ordering a remand in this situation also." (Para 9(5), page 229).**

**The Judgment of the High Court of Madras in G.Ramachandra Gupta and another v. Pandurangam Chetty and others (AIR 1953 Madras 955) may also be noticed holding that Order 41 Rule 27 does not contemplate the remand of a suit to the trial Court for fresh disposal. It was held:**

> **"2……..In any event O. 41, R. 27, Civil P.C. does not contemplate an appellate Court remanding a suit to the trial Court for fresh disposal with a direction to admit any fresh evidence before it. This provision makes it obligatory on the appellate Court itself to admit additional**

> **evidence and take it into consideration although, it may, under O. 41, R. 28, Civil P.C., direct the trial Court, or any other subordinate Court, to record such evidence and send it to the appellate Court to assist it in arriving at a final decision. If the learned District Judge felt that the interests of justice required the opinion of a hand-writing expert there was no legal impediment to his obtaining that assistance by way of additional evidence under O. 41, R. 27(1)(c), Civil P.C. and utilizing it for a final disposal of the appeal. One thing he cannot do, and that is, admit further evidence in appeal and then remand the suit for a fresh disposal to the trial Court on the footing of such evidence to be taken before it, thereby incidentally embarrassing also the trial Court very considerably, which had come to its own conclusion to the best of its ability on the material placed before it." (Para 2 Page 956).**

**The judgment and order in appeal is accordingly set aside with the following directions:**

**(a) The appeal is disposed with a direction that the additional evidence is to be recorded by the trial Court. For this purpose, the**

**appellate Court is directed to forward the necessary material / records before the learned trial Court for purposes of recording evidence. Needless to add that both parties will be given a chance for leading evidence, including evidence in rebuttal to the one allowed by the appellate Court under Order 41 Rule 27.**

**(b) Such evidence will be sent by the trial Court to the appellate Court after recording it, which will then proceed with the appeal which is treated for all intents and purposes to be pending on the record of the learned appellate Court.**

**(c) The parties are directed to appear before the learned trial Court personally or through their counsel on 22.10.2007.**

**(d) The trial Court shall dispose of the matter within four months from the date of first appearance and the appellate Court will dispose of the appeal within six months from the date when the additional evidence is placed on the record.**

**This appeal is accordingly disposed of. All pending applications shall also stand disposed of. There shall be no order as to costs.**

**July 17, 2007 (PC). (Dev Darshan Sud), J.**